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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 459

ROBERT C. SEARS and LAVONNE STERN,
Petitioners,

vs.

KAREN AUSTIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 20, 1961, and printed in Appendix "B" attached hereto.

OPINIONS BELOW

The opinion of the District Court is reported at 180 F. Supp. 485 and is printed in Appendix "C" attached hereto.

The opinion of the Court of Appeals affirming the decision of the District Court is printed in Appendix "A" attached hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 20, 1961. A timely petition for rehearing was denied on July 25, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101 (c).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals has the power to amend, modify, or alter a statute where the language is plain and unambiguous?

(2) Assuming that it has such power, whether it did so in accordance with controlling federal and state Court decisions?

The questions are important because they involve the rights of hundreds of thousands of federal employees and their families under the Federal Employees' Group Life Insurance Act.

STATUTE INVOLVED

The provisions of the Federal Employees' Group Life Insurance Act are contained in 5 U.S.C. Sec. 2091 et seq. Pertinent provisions of Sec. 2093 of this Act are as follows:

"Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence.

First, to the beneficiary or beneficiaries as the employee may have designated by a writing received in the employing office prior to death;

Second, if there be no such beneficiary, to the widow or widower of such employee;

Third, if none of the above, to the child or children of such employee and descendants of deceased children by representation."

REGULATION INVOLVED

Sec. 37.10 of Title 5 Code of Federal Regulations, entitled "Designation of Beneficiary", the pertinent portion of which follows:

"(b) No change or cancellation of beneficiary in a last will and testament or in any other document not witnessed and filed as required by the regulations in this part shall have force or effect."

STATEMENT OF THE CASE

Cecil Sears, the deceased, was an employee of the Internal Revenue Service of the United States. As a federal employee he was covered by a life insurance policy made available to him through the Federal Em-

ployees' Group Life Insurance Act, *supra*. The controversy arises over the proceeds of this policy.

Robert Sears and LaVonne Stern, petitioners herein, are the children of the deceased, and they claim that they are entitled to the proceeds because no valid designation of beneficiary was made in accordance with the provisions of the policy, the statute and the regulations issued thereunder. Karen Austin, respondent herein, is not related to the deceased but claims the proceeds by virtue of a holographic will designating her as the beneficiary of the policy.

The deceased retired on October 31, 1956, without having made a written designation of beneficiary. As is usual with federal employees, he had not been furnished with a copy of the policy itself, but had been furnished with a Federal Employees' Group Life Insurance Retired Employees' Certificate which consisted of one printed sheet. This Certificate explained in general terms the rights and benefits to which the holder was entitled. Upon the reverse side of the Certificate under the heading "Who Receives Your Insurance Benefits?" the following was printed:

> "*You do not need to name a beneficiary if you are satisfied to have your life insurance benefits paid in the order of precedence noted below.* If you are survived by a designated beneficiary, the benefits will be paid to the beneficiary. If there is no designated beneficiary surviving, the benefits will be paid to your widow or widower under category (1); and if you have no survivor falling in category (1), the benefits will be paid to the

survivors falling in category (2); and so on, as necessary, to the other categories.

(1) Your widow or widower.

(2) Your child or children in equal shares, with the share of any deceased child distributed among the descendants of that child.

* * * * * * *

"If you wish to name a person or persons not included in the categories above, or to name a person or persons listed but in a different order, you should designate a beneficiary. You may secure the proper form to name a beneficiary or to change the designation from the U.S. Civil Service Commission, Washington 25, D.C. *To be valid, your designation or change of beneficiary must be in writing, signed and witnessed, and must be received by the Commission before your death.* A witness to the designation may not receive payment as a beneficiary. You do not need the consent of anyone to change your beneficiary. You do not need to fill out a new form or notify the Commission when your address or that of a beneficiary changes." (Italics supplied.)

From 1952, until his death on August 8, 1958, deceased, having been previously divorced from his wife, maintained a rather uncertain relationship with the respondent, Karen Austin. The evidence indicated that the deceased could have signed and executed a designation during the period following his retirement in 1956 but failed to take such action. Instead deceased executed a holographic will on January 8, 1958 in the presence of respondent, in which he requested *inter*

alia that "my insurance policy with the Federal Government or any assets be given to Karen Austin . . .". He then handed the holographic will to respondent and told her to "give it to Mrs. Barnes and ask her to put it in her safety deposit box". At that time deceased was employed on a part-time basis by a firm of certified public accountants and he continued this work for six months after the execution of the holographic will to within a few weeks of his death. At no time did he attempt to comply with the provisions set forth in said Retired Employees' Certificate and the statute requiring that the designation or change of beneficiary must be by a writing received by the Civil Service Commission before insured's death.

Petitioners contended that the provisions in the policy, in the certificate, and in the statute itself, were clear and unambiguous, and that they set forth clearly that the deceased did not have to designate anyone at all if he was satisfied with the manner and the precedence in which his close relatives would be entitled to the proceeds of his insurance policy after his death. On the other hand if he wished to designate a beneficiary, such designation had to be in writing and had to be received by the U.S. Civil Service Commission, Washington, D.C. before his death. Petitioners also contended that not only was there no actual compliance but there was no substantial compliance with the foregoing provisions, but at the most an equivocal and ineffectual attempt by the deceased to designate the respondent Karen Austin as the beneficiary of his insurance policy.

The District Court decided that even though the only act of the deceased consistent with his desire to designate a beneficiary was the execution of the holographic will, that that act alone was sufficient to designate respondent as beneficiary over his own children, and awarded the proceeds of the policy to her.

The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING A WRIT

I

THE COURTS BELOW USURPED THE LEGISLATIVE FUNCTION OF CONGRESS BY CONSTRUING A STATUTE THE LANGUAGE OF WHICH IS PLAIN AND UNAMBIGUOUS

The fundamental rule of statutory construction is, and for a long time has been, that where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. *U.S. v. Public Utilities Commission of California*, 345 U.S. 295; *Tracy v. County of Fresno*, 125 C.A. 2d 52, 270 P. 2d 57; and see cases collected 82 C.J.S. 577, 583.

The same rule applies to insurance policies. In *Collins v. United States*, C.A. 10, 161 F. 2d 64, 67, the Court said:

> "Insurance policies are contracts between the insured and the company. The parties are free to make any contract they may choose, not prohibited by law, and when once they have made their contract they will be bound thereby, and when the contract is free from ambiguity, the

> court has no latitude in interpreting or enforcing its provisions. It is only where there is ambiguity in some of the provisions of the agreement that the equitable powers of the court may be invoked in construing the contract in a light most favorable to the insured."

Also it is a long settled rule that the Courts must confine themselves to the construction of the law as it is and not attempt to amend or change the law under the guise of construction. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593; and see cases collected 82 C.J.S. 533.

Mr. Justice Frankfurter in delivering the opinion of the Supreme Court in *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617, 618 stated this rule as follows:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. . . . After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of

> the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

There is no ambiguity in Section 2093, *supra,* of the Federal Employees' Group Life Insurance Act regarding designation and change of beneficiary. The language of the statute clearly means that a designation of beneficiary to be effective must be (1) not only by a writing but (2) by *a writing received in the employing office prior to death.* In the instant case all we have is a writing which was not received by the Civil Service Commission, the employing office, prior to death. In fact, no attempt was even made to send it to the Commission. Instead deceased instructed that it be placed in the safety deposit box of a third party. Accordingly there being no compliance with the statute, the designation by deceased of respondent, Karen Austin, who was not even related to him, was ineffective to deprive his own children of the proceeds of the policy.

II

ASSUMING THAT THERE WAS ROOM FOR CONSTRUCTION OF THE STATUTE THERE MUST BE SUBSTANTIAL COMPLIANCE WITH ITS TERMS TO PERMIT RECOVERY BY RESPONDENT KAREN AUSTIN

Designation or change of beneficiary under a Federal Employees' Group Life Insurance policy, although not strictly in accord with the policy or the statute, may still be effective where there has been "substantial compliance" with the terms thereof. The controlling proposition in California and in the Ninth

Circuit relied upon by the petitioners below is set forth in *Cook v. Cook,* 17 Cal. 2d 639, 111 Pac. 2d 322; and *Connecticut General Life Insurance Co. v. Hartshorn,* C.A. 9, 1956, 238 F. 2d 417. In the instant case the deceased at the most, stated his intention to designate the respondent as beneficiary of his life insurance policy. However, he took no act which would communicate his intention to the insurer. Instead the deceased instructed respondent to place the will in the safety deposit box of a third party. This act does not fall within the rule of substantial compliance as laid down by these decisions.

In the *Cook* case, *supra,* the California Supreme Court stated at p. 648 the general rule that the method prescribed by the policy for change of beneficiary must be followed and, if it is not, no change is accomplished.

> "The rigor of the rule requiring that the method provided by the policy for a change of beneficiary must be followed, is relaxed when the controversy is between conflicting claimants and the insurer is not raising the issue. . . . However, as a general principle, the method prescribed by the policy must be followed, and if it is not, no change is accomplished, unless whatever occurred in that respect comes within one or more of the three exceptions to the rule."

The Court then listed three exceptions to the rule at pages 648 and 649:

> " 'There are three often repeated and well recognized exceptions to the rule that where the contract of insurance provides a method for making a change of beneficiary the insured must follow

substantially the method prescribed: (1) If the Society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been made; and (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been made . . .

"'With the first exception we are obviously not concerned. The second and the third are not so clear of application nor always easily distinguished from each other. However, we think the second does not apply here for the reason that it was not impossible that the course prescribed by the constitution and by-laws of the society be carried out. The third exception has been variously interpreted as meaning all that is required of the insured, leaving only ministerial duties to be performed by the insurer, . . . or, as all that it was possible for the insured to do under the circumstances under which he attempted to make the change. . . .'

"Obviously, the making of the will, the only thing done by decedent, does not come within any of those exceptions. Even if the will when made in 1925 should be considered as an attempt to change the beneficiary or assign the

> policy at that time rather than on the date of decedent's death when the will became operative, still the case would not fall within any of the exceptions because no endeavor was made to communicate such change to the insurer, and the insured would be presumed to know the law that a will is ineffective until death. . . ."

Likewise also in the instant case the making of the holographic will by the deceased without any endeavor to communicate with the insurer, i.e., the employing office, was insufficient to designate a beneficiary under the insurance policy.

The rule in the *Cook* case has been followed by the Ninth Circuit in the *Hartshorn* case, *supra*. Here the deceased's divorced wife claimed the proceeds of a group life insurance policy contending that the records of the insurance company did not show that the deceased communicated to the insurance company about his intention to change beneficiaries, and even though there was evidence showing that he intended to name his brother beneficiary of his insurance policy, he did not comply with the provisions relating to the change of beneficiary as required in the group life policy. The trial Court stated that the insured *intended* to name his brother as beneficiary *but that there was neither actual nor substantial compliance with the provisions* in the policy. Therefore, it held the estate of the insured entitled to the proceeds. The Circuit Court went further, and held that because of noncompliance with the provisions in the policy by the insured his ex-wife was entitled to take the pro-

ceeds as beneficiary. The fact that there was evidence that the insured did not intend her to take the proceeds was not important because the insured could have changed the beneficiary in the manner prescribed by the policy.

Thus, the *Hartshorn* case illustrates the principle that the provisions in group life insurance policies regarding the designation or change of beneficiaries are not merely procedural but substantive, and are necessary to prevent fraud, duress, undue influence, or other ways of taking advantage of insureds at a time when they are most susceptible—the last days of their lives.

Also, in the *Hartshorn* case, as in the instant case, the insurance company was not involved in the litigation, having interpleaded and deposited the disputed funds with the Court. There could be, therefore, no contention that the Court required substantial compliance with the provisions in the policy only in order to protect the insurer.

The Courts below held that deceased's statement of intention alone was sufficient without requiring any act of communication of such intention to the insurer (in this case the Civil Service Commission), relying principally on decisions under the National Life Insurance Act such as *U.S. v. Palmer*, C.A. 2, 1956, 238 Fed. 2d 431, cert. den., 352 U.S. 956.

Courts have been often extremely liberal in upholding designations of and changes in beneficiaries in National Life Insurance cases. One reason given is

that the National Service Life Insurance Act, 38 U.S.C. §701 et seq. and specifically §717 based on former §802(g) does not say that the change of beneficiary has to reach the agency prior to the insured's death. (*Collins v. U.S.*, 161 F. 2d 64.) On the other hand, the Federal Employees' Group Life Insurance Act, with which we are concerned, explicitly requires that a designation to be valid must (1) not only be by a writing but (2) *by a writing received in the employing office.*

The Federal Employees' Group Life Insurance Act was passed many years after the National Life Insurance Act had been in existence. It was passed after Courts had construed that earlier Act. And still, Congress saw fit to provide that the beneficiary *must be designated by the employee in writing received in the employing office prior to death.* Congress did not say that it was enough to designate a beneficiary by a mere written note or will which should express unequivocal intention of the insured. Congress provided for more.

Another reason given in upholding designations of and changes in beneficiaries in National Life Insurance cases is that there the Congressional intent was to make available benefits limited to members of the Armed Forces and to members of their families only. This is clearly distinguishable from the instant case where the Congressional intent is to make available benefits to government employees and anyone else whom they may designate whether members of their families or not. Referring again to the Court's

opinion in *Collins v. United States,* 161 F. 2d 64 at pages 69 and 70:

> "* * * This was government insurance, *provided and made available to members of the armed forces by the government.* Only members of the armed forces could obtain this insurance. It was made available to them because of the interest the government had in them *and those dependent upon them.* The government had a paternalistic interest in the members of its armed forces *and in the welfare of their families.* For these reasons it made this insurance available to them which they could not have obtained otherwise, without any thought of profit; in fact, knowing that it would incur substantial financial loss in writing the insurance. In view of all this, it is unreasonable to conclude that the government intended to encircle the right to change the beneficiary with technicalities, and make such a change difficult of accomplishment. *It is more reasonable to assume that all the government intended to require was satisfactory evidence of the intent of the insured to change the beneficiary, together with satisfactory evidence showing positive action on his part to effectuate such intent, and that when once this is shown, legal technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent of the insured soldier."* (Italics supplied.)

It is submitted that federal employment, outside of the Armed Forces, did not merit Congressional consideration of the nature referred to in the *Collins* case, above. Congress merely made it possible for the Federal employee to obtain insurance through

the employing office, in the nature of a fringe benefit which is becoming more and more available to workers outside of federal employment. *And while legal technicalities might be brushed aside where the benefits of a National Life Insurance Policy are limited to an insured's family, his wife, his children, his parents and his brothers and sisters, who are the natural bounty of his affection, it is submitted such technicalities should not be brushed aside where the benefits of a Federal Employees' Group Life Insurance Policy are not so limited, but may be paid to whomsoever an insured may designate whether members of his own family or not.*

And finally there is no regulation under the National Life Insurance Act comparable to that under the Federal Employees' Group Life Insurance Act which specifically provides that no change or cancellation of beneficiary by last will or in any other document not witnessed and filed as required by the regulations shall have force or effect. Sec. 37.10, Title 5, Code of Federal Regulations, *supra.* In the instant case the deceased attempted in effect to make a change of beneficiaries in the manner not permitted either by the Statute, the policy or the regulations. Accordingly, such attempt without any communication to the insurer or the employing office had no effect whatsoever.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 28, 1961.

Respectfully submitted,
JACK K. BERMAN,
Attorney for Petitioners.

PRATT & BERMAN,
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(Appendices A, B and C Follow)

Appendices.

Appendix A

United States Court of Appeals
For the Ninth Circuit

Robert C. Sears and LaVonne Stern, Appellants, vs. Karen Austin, Appellee.	No. 17,193 June 20, 1961

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: BARNES, HAMLIN and MERRILL, Circuit Judges

HAMLIN, Circuit Judge:

One Cecil Sears, now deceased, was an employee of the Internal Revenue Service of the United States. As a federal employee he was covered by a life insurance policy made available to him through the Federal Employees' Group Life Insurance Act, 5 U.S.C.A. § 2091 et seq. The question presented in this case is to whom shall the proceeds of this policy be paid.

Robert Sears and LaVonne Stern, appellants herein, are the children of the deceased, and they claim that they are entitled to the life insurance proceeds because they contend that no valid designation of beneficiary

was made in accordance with the provisions of the policy.[1] Karen Austin, appellee herein, claims the proceeds by virtue of a holographic will, executed by the deceased on January 20, 1958, which reads in part as follows:

> "In all due respect for my son and adopted daughter, Robert Cecil and LaVonne I must remember the time and care given to me by Karen when I was very ill and had no one to help me except her.
>
> "For this I am requesting that all my personal belongings in my apartment—my banking account —my insurance policy with the Federal Government or any other asset be given to Mrs. Karen Austin—I hereby give $1.00 to each and any other who may claim any right to my estate."

The proceeds of the policy have been deposited by the Metropolitan Life Insurance Company into the registry of the court, and the insurance company is no longer a party to the litigation.

The district court found that the proceeds of the policy should be paid to Karen Austin, and appellants have filed a timely appeal from that decision. Jurisdiction in the district court was based on 28 U.S.C.A. § 1332, and this court has jurisdiction of the appeal under the provisions of 28 U.S.C.A. § 1291.

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[1]The policy reads in part as follows:

"If, at the death of the Employee, there be no designated Beneficiary . . . then the amount of the insurance . . . shall be payable to the person or persons listed below surviving at the date of the Employee's death, in the following order of precedence:

(1) To the widow or widower of the Employee;

(2) If neither of the above, to the child or children of such Employee and descendants of deceased children by representation . . . ."

The decedent retired on October 31, 1956, without having made a written designation of beneficiary as provided in the policy. As is usual with federal employees, he had not been furnished with a copy of the policy itself but had been furnished with a Federal Employees' Group Life Insurance Retired Employee's Certificate which consisted of one printed sheet. This certificate explains in general terms the rights and benefits to which the holder is entitled. Upon the reverse side of the certificate under the heading "Who Receives Your Insurance Benefits?" the following is printed:

> "You do not need to name a beneficiary if you are satisfied to have your life insurance benefits paid in the order of precedence noted below. If you are survived by a designated beneficiary, the benefits will be paid to the beneficiary. If there is no designated beneficiary surviving, the benefits will be paid to your widow or widower under category (1); and if you have no survivor falling in category (1), the benefits will be paid to the survivors falling in category (2); and so on, as necessary, to the other categories.
>
> (1) Your widow or widower.
>
> (2) Your child or children in equal shares, with the share of any deceased child distributed among the descendants of that child.
>
> (3) Your parents in equal shares or the entire amount to the surviving parent.
>
> (4) The duly appointed executor or administrator of your estate.
>
> (5) Your next of kin under the laws of your State of domicile at the time of your death.

"If you wish to name a person or persons not included in the categories above, or to name a person or persons listed but in a different order, you should designate a beneficiary. You may secure the proper form to name a beneficiary or to change the designation from the U. S. Civil Service Commission, Washington 25, D.C. To be valid, your designation or change of beneficiary must be in writing, signed and witnessed, and must be received by the Commission before your death. A witness to the designation may not receive payment as a beneficiary. You do not need the consent of anyone to change your beneficiary. You do not need to fill out a new form or notify the Commission when your address or that of a beneficiary changes."

Portions of 5 U.S.C.A. § 2093, relating to the payment of claims under group life insurance policies, and portions of Section 11 of Cecil Sears' policy are set forth in a footnote.[2] These provisions establish

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[2] 5 U.S.C.A. § 2093. "Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries as the employee may have designated by a writing received in the employing office prior to death;

Second, if there be no such beneficiary, to the widow or widower of such employee;

Third, if none of the above, to the child or children of such employee and descendants of deceased children by representation . . . ."

"Section 11. BENEFICIARIES.—Any Employee insured hereunder may designate a Beneficiary and may, from time to time, change his designation of beneficiary, only by filing written notice thereof, signed and witnessed, with his employing office or in the case of (1) a retired Employee and (2) an Employee whose

the procedure to be used to designate a beneficiary or to change the designation of a beneficiary.

Cecil Sears died on August 8, 1958, and his will was probated in the California courts. Appellants have made no objection to the validity of the will, nor did they file any will contest of any kind. The sole question on this appeal is whether the designation of Karen Austin made by Cecil Sears in his will is sufficient to entitle her to the proceeds of the policy.

The district court found that the decedent intended that the appellee have the proceeds of the policy and made the following statement:

> "Unquestionably, decedent failed to follow the prescribed procedure in executing the designation of plaintiff, but it is equally free of doubt that the will manifested an unequivocal intention that the proceeds of the policy should accrue to her. Considering the particular circumstances of his

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Life Insurance hereunder is continued while he is in receipt of benefits under the Federal Employees' Compensation Act, with the Policy-holder, whereupon an acknowledgment of such designation or change will be furnished the Employee. Consent of the Beneficiary shall not be requisite to any change of beneficiary. A witness to a designation or change of beneficiary shall be ineligible to receive payment as a Beneficiary. A designation or change of beneficiary shall take effect only if it is received by the appropriate office prior to the death of the Employee and shall be effective as of the date of receipt of said written notice. • • •

"If, at the death of the Employee, there be no designated Beneficiary as to all or any part of the insurance, then the amount of the insurance payable for which there is no designated Beneficiary shall be payable to the person or persons listed below surviving at the date of the Employee's death, in the following order of precedence:

(1) To the widow or widower of the Employee;

(2) If neither of the above, to the child or children of such Employee and descendants of deceased children by representations; • • •"

> case, and in view of the fact that decedent was a sick and ailing man, the execution of the will can be deemed a reasonable effort on his behalf to execute the designation of plaintiff as beneficiary."

It is the correctness of this decision that is attacked on this appeal. The appellants argue that the designation is not effective, regardless of intent, if the provisions of the policy are not complied with. However, we feel that the decision of the district judge is correct, and that Cecil Sears' holographic will did effectively designate Karen Austin the beneficiary of the life insurance policy.

Our attention has not been called to any Court of Appeals decision construing the provisions of 5 U.S.C.A. § 2093, a relatively new statute. A district court decision, *Smith v. Metropolitan Life Insurance Co.*, 142 F.Supp. 320 (N.D.Cal. 1956), held that the controlling factor is the intent of the insured, not compliance with formal requirements.

> "The universal rule . . . is that the policy provisions specifying the method of changing the designated beneficiary are for the benefit of the insurer and not the insured, and that the clear intention of the insured should be given effect even though the method specified in the policy is not followed."[3]

Courts of Appeal have many times passed on situations similar to that presented by the case at bar where National Life Insurance policies were involved.

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[3]142 F.Supp. at 322.

Attempts to change a beneficiary have repeatedly been held effective even though the technical requirements set forth in the policies, and the statutes setting up the insurance plan, have not been complied with.

In *United States v. Palmer*, 238 F.2d 431 (2d Cir. 1956), *cert. denied*, 352 U.S. 1026 (1957), the court, discussing a purported change of beneficiary in a National Life Insurance policy, said:

> Concededly, in the case before us the substitution of the mother as the insured's beneficiary did not fully comply with these regulations. But in the field of National Life Insurance the cases are legion which hold that in judging of the efficacy of an attempted change of beneficiary "the courts brush aside all legal technicalities in order to effectuate the manifest intention of insured." Roberts v. United States, 4 Cir., 157 F.2d 906, 909, certiorari denied 330 U.S. 829, 67 S.Ct. 870, 91 L.Ed. 1278. This case may be cited as typical of this long, unbroken, line of authority.[4]

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[4]To the same effect see *Kell v. United States*, 202 F.2d 143 (5th Cir. 1953), "The cases are unanimous that in war-risk insurance cases involving change of beneficiary the courts will brush aside all legal technicalities in order to effectuate the manifest intent of the insured . . . . Literal compliance with the provisions of a policy is never necessary . . . .": *Mathis v. United States*, 179 F.2d 824 (7th Cir. 1950), "The clearly expressed intention and purpose of the soldier should control, and should not be thwarted by the fact that all the formalities for making this purpose effective may not have been complied with"; *McKewen v. McKewen*, 165 F.2d 761 (5th Cir. 1948), "[T]he provisions for written notice of change of beneficiary in such insurance contracts are for the benefit of the insurer . . . ."; and *Johnson v. White*, 39 F.2d 793 (8th Cir. 1930), "It is urged on behalf of appellee that the change of beneficiary was not made in the manner required by the regulations, and that the change could only be made in the manner as provided. The regulations, however, were largely for the protection of the government, and could be waived by the government."

We feel that the provisions of this policy setting up the method by which a beneficiary may be designated or changed are for the protection of the insurer, and we do not feel that the technical provisions are placed in the policy to protect the insured against hasty or impetuous action. In the case now before this court, the insurer is no longer a party, and the battle is between possible beneficiaries. Since this is the case, there is no reason to invoke technical provisions designed to protect an insurer against the possibility of double payment. We feel that the clearly manifested intent of the insured should control, and we feel that the federal cases clearly support this position.

Appellant's reliance on *Cook v. Cook*, 17 Cal.2d 639, 111 P.2d 322 (1941) is misplaced. In the first place this court is called upon in this case to construe a policy the provisions of which are established by federal law, and federal law not state law is controlling in determining to what extent literal compliance with the policy provisions is necessary in order to effectuate a designation of beneficiary. *Cook* involved a private contract of insurance, not one written as part of a program established by federal law.

The appellants are in error when they assert that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), directs this court to apply California law to the case at bar. The insurance policy in question was made available to the federal employee by federal legislation. The decision of this case depends on the construction to be given that legislation. This is a question of federal

law not of state law. In the situation here presented it would be unwise to assume that Congress, which has the power to say what law is to govern, intended that the federal courts look to the state law to determine what acts are necessary to change beneficiary.

The appellants have cited some cases where the federal courts have looked to state law to determine the meaning of the word "child" as used in a federal statute. *Grove v. Metropolitan Life Ins. Co.*, 217 F.2d 918 (4th Cir. 1959); *Brantley v. Skeens*, 266 F.2d 447 (D.C.Cir. 1959). The reason for resorting to state law in some instances where Congress has not explicitly developed an independent body of federal law is succinctly set forth in *DeSilva v. Ballentine*, 351 U.S. 570, 580 (1956).

> We come then to the question of whether an illegitimate child is included within the term "children" as used [in the federal statute]. The scope of a federal right is of course a federal question, but that does not mean that its content is not to be determined by state law, rather than federal law. This is especially true where a statute deals with a familiar relationship; there is no federal law of domestic relations, which is primarily a matter of state concern. [Citations omitted]

It is reasonable to look to state law in a situation where there is a well developed body of state law and no federal law, as is the situation with regard to domestic relations; and the courts have consistently found that this was what Congress intended. However, an entirely different matter is presented by the

case now before this court. The construction of the federal statute is, in the first instance, a federal question. There is no well developed body of state law on the issue here presented, nor is there any overwhelming state interest that would suggest that here Congress intended that the courts look to the various states for the procedural rules to be applied in naming beneficiaries in federal insurance policies. In the interest of uniformity it is much better that the federal courts here develop a separate body of law rather than look to state law—and fifty different interpretations. See also *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946); *United States v. Cambridge Loan & Building Co.*, 278 U.S. 55 (1928); *LaBove v. Metropolitan Life Ins. Co.*, 264 F.2d 233 (3d Cir. 1959); *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957).

In the second place, the facts of the *Cook* case, as outlined below, did not make a very compelling situation for allowing a waiver of the policy provisions.

When the policy in *Cook* was originally issued the named beneficiary was Horatio Nelson Cook, son of the insured. The insured subsequently remarried, having been divorced from his first wife, and on September 21, 1921, changed the beneficiary, making the new wife beneficiary. In making this change all of the provisions of the policy were fully complied with. The deceased later provided in his will:

> "Because my beloved daughter Pauline is well provided for by my former wife who recently inherited from her mother I am leaving forty percent of what I possess to my son Nelson knowing

> that he will pay his sister the forty dollars a month referred to or more if he is able. A policy of insurance Equitable Life Assurance Co. No. 2,536,262 payable on its face to Horatio Nelson Cook is to be collected by him and paid to her . . . ."[5]

The California Supreme Court held that the provision of the will was not effective to change the beneficiary to Horatio, as trustee. In so deciding the court categorically stated that "no expression in the insured's will purporting to assign his life insurance policy or change the beneficiary can be effective." However, the court also mentioned the fact that the insured had once before changed the beneficiary and had at that time complied with the terms of the policy. The court also recognized that there are occasions when an insured may change beneficiaries without compliance with the strict terms of the policy.

> "The rigor of the rule requiring that the method provided by the policy for a change of beneficiary must be followed, is relaxed when the controversy is between conflicting claimants and the insurer is not raising the issue. Pimentel v. Conselho Supremo, etc., 6 Cal.2d 182, 57 P.2d 131, 133. However, as a general principle, the method prescribed by the policy must be followed, and if it is not, no change is accomplished, unless whatever occurred in that respect comes within one or more of the three exceptions to the rule.

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[5]While the face of the policy had originally named Horatio beneficiary, the insured thereafter in accordance with the provisions of the policy, had executed and delivered to the Company a document designating his wife as beneficiary.

> Those exceptions are based on equitable principles and are designed to assist an insured in carrying out his intent to change a beneficiary in instances such as when he has done all that he could have done to make the change, there is a waiver, or he was prevented from making the change, and where there was not a liberal compliance with the terms of the policy."

Thus the court in *Cook* was faced with a situation where the deceased had previously made a change of beneficiary complying completely with the terms of the policy and where the will that purportedly made the change erroneously referred to Horatio as the present owner. Even if the California courts would still hold, if presented with a private insurance situation similar to this case, that a beneficiary cannot be changed by will, we are not bound in this case by California law; and we choose to follow the more liberal provisions of the federal law as outlined by the cases cited above.

In the case now before this court the deceased had made no previous designation of beneficiary, and the finding of the trial judge that the deceased intended to make Karen Austin the beneficiary of the policy is amply supported by the evidence. The fact that he did not make his original designation in the exact manner set forth in the policy, should not prevent his definite intention, manifested by the affirmative act of drawing up a will, from being given effect.

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed June 20, 1961.

Frank H. Schmid, Clerk.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Robert C. Sears and LaVonne Stern, Appellants, vs. Karen Austin, Appellee.	No. 17,193

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and entered June 20, 1961.

Frank H. Schmid, Clerk.

Appendix C

Original
Filed
Jan. 18, 1960
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California, Southern Division

Karen Austin, Plaintiff, vs. Robert C. Sears, et al., Defendants.	No. 37866
Metropolitan Life Insurance Co., a corporation, Cross-Claimant, vs. Karen Austin, Robert C. Sears, and Lavonne Stern, Cross-Defendants.	

MEMORANDUM AND ORDER

This is an action by one Karen Austin for the proceeds of a Federal Group Life Insurance Policy issued by Metropolitan Life Insurance Co. The insurance company has deposited the funds in dispute into the registry of the court and is no longer a party to the litigation. The defendants are Robert C. Sears and Lavonne Stern, a son and adopted daughter of Cecil Sears.

The Group policy involved became effective on or about November 24, 1954 and Cecil Sears, an employee of the Internal Revenue Service, thereafter became insured according to the terms and to the extent therein provided.[1] The relevant section of the Group policy, Section 11, as amended, provides in part as follows:

> "Section 11. Beneficiaries.—Any Employee insured hereunder may designate a Beneficiary and may, from time to time, change his designation of beneficiary, only by filing written notice thereof, signed and witnessed, with his employing office or in the case of (1) a retired Employee and (2) an Employee whose Life Insurance hereunder is continued while he is in receipt of benefits under the Federal Employee's Compensation Act, with the Policy-Holder, whereupon an acknowledgment of such designation or change will be furnished the Employee. Consent of the Beneficiary shall not be requisite to any change of beneficiary. A witness to a designation or change of beneficiary shall be ineligible to receive payment as a Beneficiary. A designation or change of beneficiary shall take effect only if it is received by the appropriate office prior to the death of the Employee and shall be effective as of the date of receipt of said written notice. * * *
>
> "If, at the death of the Employee, there be no designated Beneficiary as to all or any part of the insurance, then the amount of the insurance

[1]Federal employees need not apply for insurance coverage but are automatically insured under the group life insurance plan. Employees are deemed insured unless they file a "Waiver of Life Insurance Coverage" pursuant to §37.3 of Title 5, Code of Federal Regulations.

payable for which there is no designated Beneficiary shall be payable to the person or persons listed below surviving at the date of the Employee's death, in the following order of precedence:

(1) To the widow or widower of the Employee;

(2) If neither of the above, to the child or children of such Employee and descendants of deceased children by representation; * * *"

On October 31, 1956 Cecil Sears retired from his occupation as a federal employee without having made a written designation of beneficiary as provided in the policy. At the time of his death on August 8, 1958 no designation of beneficiary had been accomplished in the manner contemplated by Section 11. However, while the decedent had been furnished the usual Federal Employee's Group Life Insurance Retired Employee's Certificate (consisting of one printed sheet) he, like all federal employees, had not been furnished with a copy of the insurance policy itself, but merely received said certificate. The certificate explains "in general terms" the available rights and benefits. The reverse side of the certificate under the heading "Who Receives Your Insurance Benefits?" provides as follows:

"You do not need to name a beneficiary if you are satisfied to have your life insurance benefits paid in the order of precedence noted below. If you are survived by a designated beneficiary, the benefits will be paid to the beneficiary. If there

is no designated beneficiary surviving, the benefits will be paid to your widow or widower under category (1); and if you have no survivor falling in category (1), the benefits will be paid to the survivors falling in category (2); and so on, as necessary, to the other categories.

(1) Your widow or widower.

(2) Your child or children in equal shares, with the share of any deceased child distributed among the descendants of that child.

(3) Your parents in equal shares or the entire amount to the surviving parent.

(4) The duly appointed executor or administrator of your estate.

(5) Your next of kin under the laws of your State of domicile at the time of your death.

"If you wish to name a person or persons not included in the categories above, or to name a person or persons listed but in a different order, you should designate a beneficiary. You may secure the proper form to name a beneficiary or to change the designation from the U.S. Civil Service Commission, Washington 25, D.C. To be valid, your designation or change of beneficiary must be in writing, signed and witnessed, and must be received by the Commission before your death. A witness to the designation may not receive payment as a beneficiary. You do not need the consent of anyone to change your beneficiary. You do not need to fill out a new form or notify the Commission when your address or that of a beneficiary changes.

* * *"

Plaintiff relies upon a holographic will, executed by the decedent in which he requested inter alia that:

> "my insurance policy with the Federal Government or any other assets be given to Karen Austin— . . ."

It is contended that the will constituted an effective designation of beneficiary notwithstanding the absence of any attempts by the decedent to designate a beneficiary in compliance with the terms of the policy.

Evidence presented showed that plaintiff and insured maintained a rather uncertain relationship in separate apartments in the same building from 1952 to 1957 and thereafter in the same apartment until the insured's death on August 8, 1958. The only action by Cecil Sears which can be regarded as consistent with a desire to designate a beneficiary is execution of the will. Defendants have not contested the validity of the will, but have sought to show that Cecil Sears could be presumed to have known that the will would be insufficient to entitle plaintiff to the proceeds of the policy. The evidence indicated that the deceased could have signed and executed a designation during the period of his retirement but failed to take such action. Defendants contend that the absence of a valid designation complying with the terms of the policy must result in the distribution of the proceeds to the line of recipients set forth in Section 11, and that designation by will is invalid in the instant case.

Two major questions are thus presented. First, whether a designation which does not conform to the provisions of the policy is sufficient to vitiate claims of next of kin who would otherwise receive the proceeds. And the additional question, whether the particular manner of designation used, i.e. by will, is effective.

Plaintiff relies heavily on *Smith v. Metropolitan Life Ins. Co.,* 142 F.Supp. 320, a case which also involved a policy issued to a federal employee pursuant to the statute creating Federal Employee's Group Life Insurance. (5 U.S.C.A. §2091, et seq.) In *Smith* it was urged that the proceeds should not accrue to the designated beneficiary since the original designation of the beneficiary was to be deemed automatically cancelled, pursuant to Section 11 of the policy, when the deceased was placed on retired status. The court, citing *Gerstenlauer v. U. S.*, 108 F. Supp. 654, rejected this contention stating the general proposition that policy provisions specifying the method of changing the designated beneficiary are for the benefit of the insurer and not the insured. Failure to comply strictly with prescribed procedure was held to amount merely to a procedural defect where, as here, the insurer and the government agency for whose benefit the provision was written were no longer parties to the proceedings. The case of *Cook v. Cook,* 17 Cal. 2d 639 at 648, relied on by defendants, is in accord with this approach:

> "The rigor of the rule requiring that the method provided by the policy for a change of

> beneficiary must be followed, is relaxed when the controversy is between conflicting claimants and the insurer is not raising the issue. Citing *Pimentel v. Conselho Supremo,* etc., 6 Cal. 2d 182".

Earlier California cases have held that "while a change of beneficiaries must be made under certain formalities for the protection of the insurer, yet, in cases where the company has waived defending by interpleading, . . . and has no further interest in the litigation between the parties, a far more liberal rule obtains, and the courts of equity seek to do what the insured apparently intended to have done, and to award the fund to that claimant who had the strongest claim thereto under the existing condition." *Shaw v. Johnson,* 15 Cal. App. 2d 599 at 607, and cases cited.

Courts have continually emphasized the importance of the intention of the insured and the weight to be given to that intention. "Even in the absence of a formal change of beneficiaries, courts consistently have sought to ascertain and enforce the true intention of the insured." *Stafford v. U.S.,* 128 F.Supp. 435, and cases cited. An excerpt from *Gerstenlauer,* supra, cited with approval in *Cook* indicates the prevailing attitude, "It is unnecessary to quote from the many cases in which the Courts have looked to the substance rather than to the form in giving effect to a change in beneficiaries named in government life insurance policies, where the purpose is clear and reasonable efforts have been made to effectuate it."

The expressed intent of decedent in the instant case is stated in no uncertain terms in the holographic will, which requested:

> "That all my personal belongings in my apartment, my banking account, my insurance policy with the Federal Government or any other asset be given to Mrs. Karen Austin".

Plaintiff here was thus expressly designated in decedent's will as entitled, inter alia, to the policy in question here. Whether decedent intended to comply with the express terms of the policy at a later date is a moot question. Defendants urge that decedent had no such intention and did not really desire to confer the proceeds of the policy on plaintiff. They claim that "decedent knew and was well aware of what had to be done in order to designate a new beneficiary". Defendants' reasoning would be more persuasive if decedent had at any time designated a named beneficiary in the manner prescribed in the policy. However, since he had never complied with the procedural steps required, and in view of the fact that he had been separated from government service for several years, it would appear questionable whether decedent was in fact aware of the necessity of further procedural steps to effectuate the designation of plaintiff in compliance with the terms of the policy. Decedent merely had the provisions of the certificate set out above to guide him in making a designation. Those provisions are far less explicit than the terms of Section 11 of the policy.

The contention of defendants that decedent actually desired to confer the proceeds of the policy upon his natural heirs has not been proven. To the contrary, language of the will indicates that he intended to assure the exclusive heirship of plaintiff;

> "I hereby give $1 to each and any other person who may claim any right to my estate."

The opening words of the will are also indicative of the fact that the decedent was well aware that the disposition made would be to the detriment of defendants:

> "In all due respect for my son and adopted daughter, Robert Cecil and Lavone, I must remember the time and care given me by Karen when I was very ill and had no one to help me except her. . . ."

The claim of defendants that decedent always intended them to be his beneficiaries, is untenable in the light of the foregoing.

Unquestionably, decedent failed to follow the prescribed procedure in executing the designation of plaintiff, but it is equally free of doubt that the will manifested an unequivocal intention that the proceeds of the policy should accrue to her. Considering the particular circumstances of this case, and in view of the fact that decedent was a sick and ailing man, the execution of the will can be deemed a reasonable effort on his behalf to execute the designation of plaintiff as beneficiary.

Defendants have also contended that a designation of beneficiary by will is ineffective in the instant case. No express prohibition in this regard is found in the policy, in the certificate handed the insured, or in the statutes creating Federal Employee's Group Life Insurance, however the applicable regulations seem to

support the contention. Sec. 37.10 of Title 5, Code of Federal Regulations, entitled "Designation of Beneficiary" provides in part:

> "(b) No *change* or *cancellation* of beneficiary in a last will and testament or in any other document not witnessed and filed as required by the regulations in this part shall have force or effect". (Emphasis supplied)

Plaintiff argues that the effect of this regulation should be evaluated in the light of the judicial interpretation given to similar provisions concerning National Life Insurance policies. *Smith*, supra, is cited as authority that these decisions provide guidance in construing the statutes under which the instant policy was created. Cases construing National Life Insurance policies have held on occasion that a change of beneficiary contained in a will can be effective in spite of the language of the regulations. *Woods v. U.S.*, 69 F.Supp. 760; *Moths v. U.S.*, 179 F.2d 824; *Zabor v. U.S.*, 113 F.Supp. 287; Contra: *Hester v. Hester*, 171 F.2d 477.

In *Woods v. U.S.*, 69 F.Supp. 760 at 763, the court held that:

> "The statute does not by its own language prohibit such change of beneficiary by will, and only by resort to the regulations made thereunder is there found such prohibition. The purpose of such regulation is to avoid confusion and to protect the insurer. In this case no payment, in any amount, to anyone, has been made on the insurance. To hold the designation by will alone to be sufficient to change the beneficiary would not

> change the liability of the insurer, and would certainly give effect to the manifest intention of the soldier."

A similar approach is found in *Zabor v. U.S.*, 113 F. Supp. 287 at 288:

> "Certainly the government intended only to require satisfactory evidence of the intent of the insured to change the beneficiary, together with satisfactory evidence showing positive action on his part to effectuate such intent."

The above holdings are in accord with *Smith*, supra, in considering provisions regarding designation of beneficiary as procedural rather than substantive and no compelling reason has been shown as to why strict rules should be applied in cases involving wills.

Plaintiff takes the position that the will in evidence contains an *original designation* by will and that such a designation is permissible under the regulation. It is contended that since the applicable regulation only prohibits *change* or *cancellation* by unwitnessed and unrecorded will, it must be deemed, by necessary implication to permit an *original* designation in that manner. Plaintiff supports this contention by reference to the regulation applicable to National Life Insurance which provides in part:

> "A beneficiary designation but not a change of beneficiary may be made by last will and testament duly probated". Title 38, C.F.R., 8.46.

Plaintiff urges a basic conceptional distinction between an original designation of a beneficiary by will

and the change or cancellation of a prior designation of beneficiary. No case authority is cited. However, plaintiff's contention appears valid in view of the general rule, already stated, that policy provisions specifying the mode of changing the designated beneficiary are for the benefit of the insurer and not the insured. The intended protection is designed to safeguard the insurer faced by rival claimants contending to be beneficiaries designated by the insured. Where only one beneficiary is designated, i.e., where there is only an original designation as distinct from a change affecting a prior designation, there is no doubt that the insurer must give precedence to such claimants over next of kin not designated specifically as beneficiaries. The language of the statute specifically provides that persons falling within the order of precedence, i.e., next of kin, will only be considered where the employee has *not* designated a beneficiary.[2] They

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[2]"Title 5, U.S.C.A. §2093. Death claims; order of payment

Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries as the employee may have designated by a writing received in the employing office prior to death;

Second, if there be no such beneficiary, to the widow or widower of such employee;

Third, if none of the above, to the child or children of such employee and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of such employee or the survivor of them;

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such employee;

Sixth, if none of the above, to other next of kin of such employee entitled under the laws of domicile of such employee at the time of his death.

. . . . ."

can not therefore maintain a claim against the insurer where a named beneficiary exists.

Defendants here would only take absent a specific designation and they would have no claim if the insured had properly designated plaintiff as beneficiary. Defendants are thus not rival claimants, but would take by default upon proof of their falling within the order of precedence.[3] Clearly, this set of circumstances differs from the situation where the insurer is confronted with two individuals claiming to be specifically designated by a deceased insured. While in the latter situation the insurer needs the full protection of the procedural safeguards regarding designation of beneficiary, the former resolves itself into a simple evaluation of whether the designation of the specific claimant is valid. If it is found invalid the insurer would pay to claimants falling in the order of precedence, however, they would not be in a position to press their individual claim to the same extent as if they had been specifically designated by the insurer.

Thus, where no cancellation is involved, there is no apparent need to hold an improper designation ineffective in order to protect the insurer. Although a cancellation or change of designation in a will could result in exposing the insurer to rival claimants contending to be duly designated beneficiaries no such consequence would result where an original designa-

[3]The legislative history of the Federal Employees Group Life Insurance Act, H.R. Rep. No. 2579, 83rd Cong. 2d Sess. (1954), indicates that the particular order of precedence was adopted merely because it had proven a speedy and economical way of settling claims under other acts.

tion is made in a will. The instant designation will therefore not be found, ipso facto, invalid because it is contained in a will.

The preponderance of the evidence presented indicates that the decedent intended plaintiff to be his beneficiary. Pursuant to authorities cited, this court will enforce the clearly expressed intention of the decedent and accordingly the proceeds of the policy in question are hereby awarded plaintiff. Let judgment be entered accordingly.

Findings of fact and conclusions of law are to be prepared in accordance with the rule.

Dated: January 18, 1960.

Lloyd H. Burke
United States District Judge.